In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1772, 73-1776, 73-1790, 73-1825

SOUTHERN CALIFORNIA GAS COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

Petitioners [1] challenge the validity of orders of the Federal Power Commission (Pet. App. 54-69) [2] es-

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[1] The petitions in Nos. 73-1790 and 73-1825 were filed out of time. The judgment of the court of appeals was entered on January 21, 1974. Petitions for rehearing were denied on February 25, 1974. The time within which to file a petition for a writ of certiorari expired on May 26, 1974, and no extensions were granted. (May 26 was a Sunday, and May 27 was a legal holiday.) The petition in No. 73-1790 was filed on May 29, 1974, and the petition in No. 73-1825 was filed on June 3, 1974. This Court therefore lacks jurisdiction over those petitions (28 U.S.C. 2101(c)). We accordingly address ourselves in this response only to the contentions of the petitioners in Nos. 73-1772 and 73-1776.

[2] "Pet. App." refers to the appendix to the petition of Southern California Gas Company, No. 73-1772.

tablishing an interim plan, pending further proceedings to establish a permanent plan, for the curtailment of natural gas deliveries, during periods of shortage, to customers of El Paso Natural Gas Company, a large interstate pipeline. The court of appeals, in an opinion that fully and accurately states the facts and background of the case, affirmed the orders in part but remanded the case to the Commission for further consideration with respect to several matters (Pet. App. 1-53). The interim plan has thus not yet been finally approved by the court of appeals. The plan will, in any event, soon be superseded by the permanent plan, which was prescribed by the Commission on June 14, 1974.[3]

The Commision's interim plan established a schedule of priorities for allocating gas supplies when El Paso's deliveries must be curtailed. Those priorities were defined in terms of the "end use" of the gas to be delivered—*i.e.*, whether the gas was destined for residential, commercial, or industrial consumption. Petitioners Southern California Gas Company (SoCal) and Pacific Gas and Electric Company (PG & E), both California distributor-customers of El

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[3] The Commission's opinion and order prescribing a permanent curtailment plan are set forth in the appendix to Southern California's reply brief (No. 73-1772), pp. 1-54. The permanent plan will take effect, according to the terms of the order, upon the issuance of a final order on the petitions for rehearing presently pending before the Commission (*id.* at 43).

The opinion on the permanent plan also constitutes the Commission's opinion on remand with respect to the interim plan (*id.* at 8-9).

Paso, contend that the interim plan unjustifiably interfered with their contractual rights to purchase gas from El Paso and improperly "shifted" gas supplies from one group of customers to another.

This Court rejected similar contentions in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621. The Court held in that case that the Commission "may order pipelines facing shortages to develop and submit rational curtailment arrangements" and may permit "the pipeline's tariff amendments to take effect despite contrary terms in existing contracts" (406 U.S. at 646). The Court also made clear that "the Commission would have emergency authority to issue interim orders effecting a curtailment plan" (*id.* at 644, n. 18).

Contrary to petitioners' assertions, nothing in the Court's opinion suggests that the Commission's emergency authority to prescribe a curtailment plan is limited to providing for "the demands of human-needs customers" (SoCal Pet. 11). Where the Commission finds that a pipeline's existing tariffs are discriminatory, it is obliged to prescribe just and reasonable tariffs to eliminate *all* aspects of the discrimination. The Commission here found that, under El Paso's existing tariffs, service to all of its residential, commercial, *and* industrial customers located east of California would be curtailed before *any* service to California customers would be curtailed. It accordingly found the plan to be "discriminatory and violative of Section 4(b) of the Natural Gas Act" (Pet. App. 60).

In eliminating that discrimination, the Commission reasonably concluded that, in a time of severe natural gas shortage, the contractual expectations of *all* users are necessarily frustrated and that the resulting burden should be spread as equitably as possible (see Pet. App. 17-18). An "end use" plan which fairly allocates the available supply among the ultimate users of the gas is not invalid merely because one or another distributor receives less gas than its contract with the pipeline might call for in a period of relatively plentiful supply. As the court of appeals correctly stated, "the Commission is not bound by agreements among parties subject to its jurisdiction" (*id.* at 18) where the result would be unduly discriminatory.

Petitioner PG & E, relying on the decision in *International Paper Co.* v. *Federal Power Commission*, 476 F. 2d 121 (C.A. 5), argues (Pet. 10-12) that the Commission failed to make essential threshold findings to justify its conclusions that allocating gas in accordance with existing tariffs would be unduly discriminatory and that requiring the pipeline to allocate gas without regard to contractual preferences would be in the public interest. As the court of appeals correctly stated, however, *International Paper* is inapposite.

> [T]he twin findings mentioned in the *International Paper* opinion are only required for the purpose of exonerating a pipe line from liability for breaches of contract which may result from compliance with Commission orders. The peti-

> tions now before us do not concern the remedial rights of the pipe line and its customers *inter sese*, but the authority of the Commission to override a contractually arranged curtailment plan. On the latter question, the statute leaves no doubt. The only preliminary finding required by the statute is that the former plan was discriminatory, a finding clearly expressed in Opinion 634. [Pet. App. 20; footnote omitted.]

Petitioner SoCal also claims that "[t]he Commission had no substantial evidence upon which it could conclude that there was any real danger to the residential and commercial customers east of California" (Pet. 17). The court of appeals found, however, that "the Commission's prediction of severe [east-of-California] curtailments under the former plan is supported by substantial evidence" (Pet. App. 28) and that "the evidence does sustain the conclusion that peak day curtailment would, at minimum, cause the complete shutdown of [east-of-California] direct industrials and substantial reduction of service to [east-of-California] commercial customers while California service remained undisturbed" (*id.* at 29).[4] Petitioner has not shown that the court of

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[4] At the same time, the court found that the record did not support a finding that east-of-California *residential* customers would have suffered curtailment under the former plan. It accordingly authorized the Commission on remand "to modify its orders accordingly, subject to further review by this Court" (Pet. App. 29). We assume, therefore, that petitioner PG & E's present claim relates only to the Commission's findings concerning commercial customers.

appeals "misapprehended or grossly misapplied" the substantial evidence standard. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491; *Mobil Oil Corp.* v. *Federal Power Commission*, No. 73-437, decided June 10, 1974, slip op. 23.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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